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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

U S WEST Communications, Inc.
Revisions to Tariff FCC No. 1

Transmittal Nos. 331, 362

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CC Docket No. 93-162

U S WEST COMMUNICATIONS, INC., APPLICATION FOR REVIEW

I. INTRODUCTION

U S WEST Communications, Inc. ("U S WEST"), through counsel and pursuant to Section 1.115 of the Federal Communications Commission's ("Commission") Rules,¹ hereby seeks review of the Common Carrier Bureau's ("Bureau") Order, released June 9, 1993,² partially suspending U S WEST's Expanded Interconnection Tariff ("EIC Tariff") and prescribing certain terms and conditions with regard to that tariff. The actions of the Bureau were unlawful, and U S WEST seeks vacation of certain portions of the Bureau's Order.

Specifically, the Bureau engaged in a "partial suspension" of U S WEST's EIC Tariff rates, under purported Section 204(a)³ authority.⁴ This action was unlawful. A partial suspension

¹47 C.F.R. § 1.115.

²US West Communications, Inc. Revisions to Tariff FCC No. 1, Transmittal Nos. 331, 362, Order, CC Docket No. 93-162, DA 93-657, rel. June 9, 1993 ("Order" or "EIC Tariff Order").

³47 C.F.R. § 204(a).

⁴Order at ¶ 99.

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cannot be used with regard to the introduction of a new carrier product, but can be utilized only when a carrier seeks to change the price of an existing offering.

With regard to newly-created carrier offerings (such as expanded interconnection ("EIC")), the Bureau's only ability to reduce carrier-filed initial rates is for it to engage in a partial prescription pursuant to its Section 205(a)⁵ authority, i.e., the establishment of interim rates. In such circumstance, however, there are assurances that later rate adjustments can be made in favor of either the carrier or the purchaser of the service. Within the context of a newly-created carrier offering, the Bureau cannot avoid the equitable framework of the Section 205(a) approach to partial prescriptions by engaging in a device called a "partial suspension."

In addition to the above, the Bureau unlawfully required U S WEST to remove certain language from our tariff regarding third-party leases and the availability of expanded interconnection offerings.⁶ This action, taken pursuant to the Bureau's Section 205 authority, was also unlawful.

⁵47 C.F.R. § 205(a).

⁶See Order at ¶ 111.

II. THE BUREAU'S ATTEMPT AT A "PARTIAL SUSPENSION" ORDER IS UNLAWFUL

The Bureau's Order "partially suspends" U S WEST's EIC Tariff.⁷ The Bureau premises its actions on Section 204(a) of the Communications Act,⁸ rather than on its prescription authority under Section 205.⁹ U S WEST was ordered to file revised tariffs reflecting this "partial suspension."¹⁰

The actions of the Bureau are unlawful under both Section 204 and Section 205 of the Communications Act. With regard to Section 204, the Bureau acted beyond the authority granted by that provision. With regard to Section 205, the Bureau did too little in its Order to bring U S WEST within the full protection of that provision.

A partial suspension of a carrier-filed tariff under Section 204(a) has meaningful reference only in those circumstances in which a carrier seeks to increase a rate for an already-existing service. The Commission then can suspend any part of the increase (i.e., a "partial suspension") or the entire increase

provision of EIC service. Any claim by the Bureau that it was engaging in a partial suspension of U S WEST's rates is not supported by the facts.

Because the "partial suspension" is really a rate prescription, it can be lawful only in those terms (including the right of U S WEST to collect past undercharges at the end of the prescription period). Under certain circumstances, the Bureau can establish interim rates without Section 205 hearings, but only so long as "neither party is bound to the interim arrangement" and retroactive rate adjustments are available.¹⁴

¹⁴American Telephone and Telegraph Company, Exchange Network Facilities, 93 F.C.C.2d 739, 762 ¶ 39 (1983) ("AT&T"). See also FTC Communications, Inc. v. F.C.C., 750 F.2d 226, 232 (2d Cir. 1984); Lincoln Telephone and Telegraph Company v. F.C.C., 659 F.2d 1092, 1107 (D.C. Cir. 1981).

The Commission itself has recognized the logical imperative of this argument. It has stated that:

the very characteristic of an interim rate established by the FCC that renders it a valid exercise of discretionary power not inconsistent with the Act is that it is accompanied by a two-way adjustment. . . . Such an adjustment ensures that the interim rate does not necessarily represent the compensation that ultimately will be received for the interconnections provided. An essential aspect of the fairness of an approximated rate, which is set without the benefit of hearings under Section 205(a) and is not a partial authorization of a carrier-initiated tariff supported by prior written showings of reasonableness under Section 204(b), is that neither party is bound to the interim arrangement. Thus, a two-way adjustment, under which either the OCCs or AT&T could be made to refund the difference between the interim and final rates to the other party, was a necessary substitute for the specific provisions for the determination of reasonableness contained elsewhere in the Act.

AT&T, 93 F.C.C.2d at 762 ¶ 39.

The Bureau did not provide for such protection. By failing to do so, it acted unlawfully under Section 205, as well.

The Bureau, in its Order, "partially suspended" U S WEST's rates for a day, with a concomitant accounting order.¹⁵ The latter will assure end-user customers that, if the Commission

lessee of space pursuant to a third-party lease.¹⁸ Such action was unlawful, and was not required by the Commission's Expanded Interconnection Order.¹⁹

Attached hereto is that portion of U S WEST's Response to Petitions to Reject²⁰ our filed EIC Tariff that responds to the matter of third-party lease provisions. That argument is incorporated herein by this reference.

In essence, U S WEST argues there, and herein, that we should not be required to secure (through a "good-faith attempt" or otherwise) the agreement from third-party landlords to provide expanded interconnection in those central offices in which we are but a lessee.²¹ We describe the kinds of additional burdens that will predictably be imposed on us by such requirement, ranging from increased rental rates to guarantee requirements.

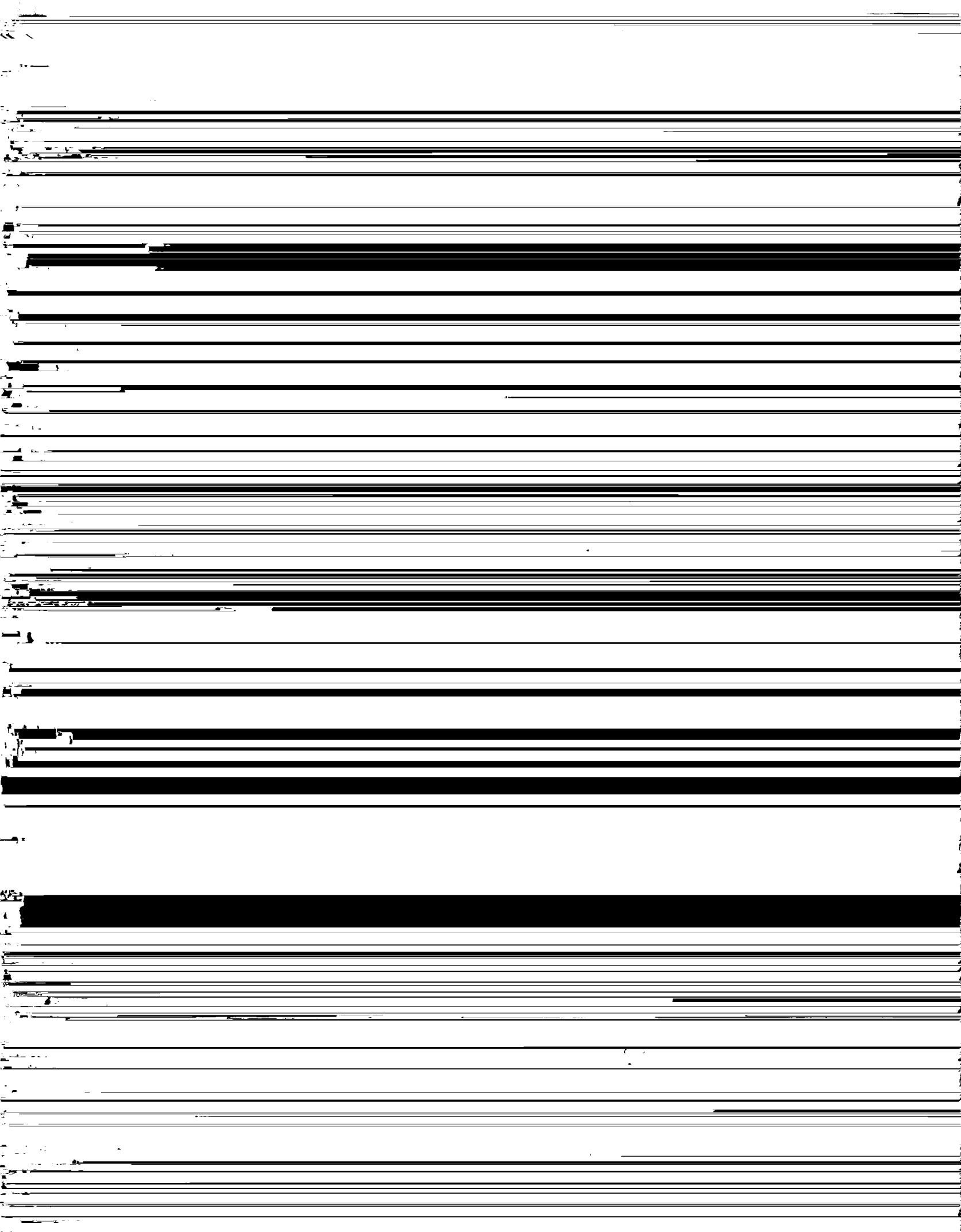
The Commission should reverse that part of the Bureau's

¹⁸See id. at ¶¶ 83, 111.

¹⁹See Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369 (1992) ("Expanded Interconnection Order"), recon., Memorandum Opinion and Order, 8 FCC Rcd. 127 (1992) ("Expanded Interconnection Modification Order"), pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. F.C.C., No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

²⁰U S WEST Communications, Inc. Revisions to Tariff F.C.C. No. 1, Transmittal No. 331, Reply of U S WEST Communications, Inc., to Petitions to Reject, Suspend and/or Investigate, filed Apr. 5, 1993.

²¹While U S WEST did not so state in our response, we are agreeable to having the term "third-party lease" exclude those leases in which the lease is held by an affiliate. The suggestion by opponents that we would create such leases simply to avoid the mandates of this Commission regarding expanded interconnection obligations are spurious, at best.



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effect as filed or to suspend those rates in their entirety pending the outcome of a Commission tariff investigation.

Respectfully submitted,

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July 9, 1993

ATTACHMENT

After some period of time and experience with expanded interconnection and collocation, U S WEST's insurance requirements will certainly be reviewed for necessity. But, until that experience has been obtained, it would be the height of regulatory overkill for the Commission to prescribe for U S WEST what its "appropriate" insurance requirements are, or should be. That is simply not a matter in which the Commission is expert. It is, on the other hand, a matter about which U S WEST has considerable expertise and which is of great concern to the company. Petitioners objections to U S WEST's insurance provisions should be rejected.

5. EIC in Space Where U S WEST is a Lessee

Teleport/Denver takes vigorous exception to U S WEST's EIC Tariff provision announcing that EIC will not be made available where U S WEST holds space as a lessee under a real estate contract.⁴⁹ It finds such provision to be a hindrance to the "availability and operation of EIC."⁵⁰ It presents no evidence to demonstrate its conclusory allegation. ALTS also finds this provision exceptional, arguing that U S WEST should be required to exert "its best efforts to obtain permission" for an interconnector to collocate on LEC premises.⁵¹

⁴⁹See U S WEST EIC Tariff, § 21.3(F). And see Teleport/Denver at 6-7.

⁵⁰Teleport/Denver at 6.

⁵¹See ALTS at Appendix D, U S WEST at 5.

Despite the fact that neither Teleport/Denver nor ALTS can show any current harm to them, or any other interconnector from U S WEST's proposed tariff provision, they demand that U S WEST be required to change its tariff provision to accommodate two scenarios: First, U S WEST should affirmatively seek consent from its lessors to allow EIC, where such is not affirmatively prohibited. Second, should an interconnector be able to secure consent from a lessor directly, U S WEST should be required to provide "all EIC services other than the leasing space."⁵² Such proposals appear beyond both the letter and spirit of the Commission's Expanded Interconnection Order. Accordingly, U S WEST does not support them.

First, U S WEST is a lessee of central office space from certain lessors. While those agreements might allow for assignments (or other kind of "subleasing" arrangement), in certain instances, they generally require consent of the lessor to the assignment. U S WEST believes that were it to approach its current lessors with regard to their willingness to allow

interests. This might not necessarily be obvious.⁵³

Additionally, it would not be unusual for a lessor (not a common carrier, but a "landlord" in the traditional "real estate" sense of that term) to require that the "sublessee," i.e., the interconnector, agree to be bound by all the terms and conditions of the master lease -- some of which might conflict with U S WEST's EIC Tariff, and some of which might be inconsistent with EIC service as common carriage.

Additionally, the lessor might well want to add additional

objectionable, and strict ingress and egress controls might be imposed.

The lessor would also want to assure itself that it did not suffer monetarily by allowing an entity less economically robust than U S WEST on its property. To protect against that, the lessor would undoubtedly require that U S WEST remain liable on the master lease for any violations. In essence, U S WEST would be required to underwrite and vouch for the vitality and responsibility of the interconnector. This is clearly an unfair burden to place on a LEC, in the name of expanded interconnection.

Finally, if, as suggested by Teleport/Denver, an interconnector wishes to approach the owner of a building in which U S WEST has a central office,⁵⁵ and negotiate the provisioning of leased space, then that interconnector would not be purchasing physical EIC as the Commission has defined it: the "bundled" offering of network connections and real estate.

For the above reasons, the arguments of petitioners against U S WEST's EIC Tariff provision regarding U S WEST's responsibilities in those situations where it is a lessee should

⁵⁵We assume that this is what Teleport/Denver meant, although its sentence is not so circumscribed ("if an IC can obtain a lease of space directly from the lessor, USWC should provide all EIC services other than leasing space.") Teleport/Denver at 7. Teleport/Denver's sentence could be read to require U S WEST to provide EIC services in those places where U S WEST leases space from a third party for a business office operation, for example, and an interconnector got permission to lease space in the same building.

be rejected. U S WEST's EIC Tariff should be permitted to go into effect, as written.

6. Prohibition Against Subleasing/licensing

Teleport/Denver objects to U S WEST's EIC Tariff provision that an interconnector is not permitted to sublet or sublicense its EIC space to third parties.⁵⁶ Teleport/Denver's objections are overreaching. A review of the Commission's Expanded Interconnection Order demonstrates that the Commission was attempting to secure space in LEC central offices for interconnectors, not for sublessees or sublicensees of interconnectors.

Interconnectors in U S WEST's central offices pursuant to EIC are there pursuant to a Commission order compelling their presence. Such interconnectors have been granted nothing more from U S WEST than a license to use certain space.⁵⁷ They are not there as generally-invited lessees, under individually-negotiated arrangements. Even with regard to this latter category, however, U S WEST does not permit subleasing or sublicensing of its space. Thus, it would be bizarre for us to permit it with regard to interconnectors.⁵⁸

⁵⁶See Teleport/Denver at 7, citing to U S WEST EIC Tariff provision § 21.4.1(2)(D).

⁵⁷See U S WEST EIC Tariff at 21.4.1(A).

⁵⁸If the Commission considers this argument in conjunction with the one raised above, it is obvious that a continuing stream of third parties begin to get enmeshed in the Commission EIC requirements. For example, if interconnectors were to convince

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